No. 14704.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

EVELYN HUBNER,

Appellant,

vs.

LLOYD M. TUCKER, Special Agent, Internal Revenue Service,

Appellee.

On Appeal From the United States District Court for the Southern District of California.

BRIEF FOR THE APPELLEE.

LAUGHLIN E. WATERS,
United States Attorney,

EDWARD R. McHALE,
Assistant United States Attorney,
Chief, Tax Division,

ROBERT H. WYSHAK,
Assistant United States Attorney,
600 Federal Building,
Los Angeles 12, California,
Attorneys for Appellee.

HARRY D. STEWARD,
HOWARD R. HARRIS,
Assistant United States Attorneys.
Of Counsel.

FILED

JUL - 1 1955

PAUL P. O'BRIEN, CLERK

Parker & Son, Inc., Law Printers, Los Angeles. Phone MA. 6-9171.

TOPICAL INDEX

PAGE

Opinion below 1

Jurisdiction 1

Questions presented 2

Statutes involved 2

Statement 3

Summary of argument 5

Argument 7

I.

The summons on its face satisfies the requirements of Sections 7602, 7603 and 7605 of the Internal Revenue Code of 1954 7

II.

Compliance with the summons would not constitute an unreasonable search and seizure 11

III.

The appellant has no standing to claim the privilege of self-incrimination with respect to the books and records summoned 13

Conclusion 14

Pertinent statutes involved ..... App. p. 1

TABLE OF AUTHORITIES CITED

Cases

	PAGE
Andrews' Tax Liability, In re, 18 Fed. Supp. 804	8
Brown v. United States, 276 U. S. 134	11
First National Bank of Mobile v. United States, 160 F. 2d 532	12
Hale v. Henkel, 201 U. S. 43	12
Martin v. Chandis Securities Co., 128 F. 2d 731	8, 12
McMann v. Securities and Exchange Commission, 87 F. 2d 377	12
Zimmerman v. Wilson, 25 Fed. Supp. 75; aff'd, 105 F. 2d 583	8, 10

Statutes

Internal Revenue Code of 1939:	
Sec. 3631	8
Internal Revenue Code of 1954 (68A Stat. 873, et seq.):	
Sec. 7402	2
Sec. 7602	1, 2, 7
Sec. 7603	2, 7
Sec. 7604	2, 3
Sec. 7605	2, 7
Sec. 7605(b)	6, 8, 9, 11
United States Code, Title 28, Sec. 1291	2
United States Code, Title 28, Sec. 1340	2
United States Code, Title 28, Sec. 1345	2

No. 14704.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

EVELYN HUBNER,

Appellant,

vs.

LLOYD M. TUCKER, Special Agent, Internal Revenue Service,

Appellee.

On Appeal From the United States District Court for the Southern District of California.

BRIEF FOR THE APPELLEE.

Opinion Below.

The Findings of Fact and Conclusions of Law [R. 70-77] and the Memorandum [R. 58-70] of the District Court are not officially reported.

Jurisdiction.

This is an appeal from a judgment and order that the appellant was in contempt for not complying with a summons issued under the authority of Section 7602 of the Internal Revenue Code of 1954, 68A Stat. 901, by an agent of the Internal Revenue Service requiring the pro-

duction of certain records in connection with the investigation of another taxpayer. Jurisdiction was conferred on the District Court by Sections 7402, 7602, 7603, 7604, 7605 of the Internal Revenue Code of 1954, 68A Stat. 873, 901, *et seq.*, and 28 U. S. C. Sections 1340 and 1345. The Findings of Fact and Conclusions of Law and Order (committing the appellant to the custody of the Marshal for contempt) were entered on February 23, 1955. [R. 70-77] Within 60 days and on February 24, 1955, a notice of appeal was filed. [R. 78] Jurisdiction is conferred on this Court by 28 U. S. C. Section 1291.

Questions Presented.

1. Whether a Special Agent of the Internal Revenue Service may summon the production of a third party's records of transactions between said third party and a taxpayer against whom a fraud investigation is being conducted, when the third party's books and records have already been previously examined for the purpose of determining the said third party's tax liability.

2. Whether compliance with the summons constitutes an unreasonable search and seizure.

3. Whether the appellant could in any way be incriminated by the production of those records and papers summoned to be produced, where they were kept in the course of her husband's business prior to their marriage, and the income for said period was reported on their joint income tax return.

Statutes Involved.

The pertinent statutes are printed in the Appendix, *infra.*

Statement.

On November 5, 1954, the appellee, Lloyd M. Tucker, a Special Agent of the Internal Revenue Service, served a summons on the appellant, Evelyn Hubner, requiring her to appear before him to give testimony relating to the tax liability of Clifford O. Boren and Delta M. Boren for the years 1950, 1951 and 1952, and to bring with her and produce for examination those books of account of the partnership known as the Hubner Building Company and the corporation known as the Hubner Building Company relating to transactions between said partnership and corporation and the aforementioned Clifford O. Boren and Delta M. Boren for the years above stated, together with pay checks, invoices, correspondence and all miscellaneous records, data and memoranda in connection therewith. The appellant, executrix of the estate of her husband, Elmer J. Hubner, who died January 12, 1954, appeared at the time and place set forth in the summons but refused to produce said books, records, paper and data of which she did have custody. [R. 71-72] Accordingly, the appellee, under the provisions of Section 7604 of the 1954 Internal Revenue Code, 68A Stat. 902, through his counsel, the United States Attorney, instituted this proceeding seeking enforcement of his summons. [R. 70-71]

Based on the pleadings, affidavits and memoranda below, the lower court found that from February 14, 1950, to September 30, 1950, the Hubner Building Company had done business as a corporation. Thereafter the corporation was dissolved and business was continued as a partnership under the name of Hubner Building Company until the date of its dissolution on June 6, 1951. The members of the partnership consisted of Elmer J.

Hubner, Alton B. Jackson and Wrelton Clarke. The affairs of the partnership, however, were not finally wound up until February 28, 1953. The appellant here did not marry E. J. Hubner until May 23, 1952, after the dissolution of both the partnership and corporation and was not at any time either a stockholder, director, or officer of the corporation, or a partner of the partnership, or an employee of either. [R. 72-73]

A routine audit had been made by the Internal Revenue Service of the books and records of both the corporation and partnership. This investigation resulted in a determination that the corporation had overpaid its tax for the fiscal year ending in 1950 and that the partnership had under-reported its income for the succeeding period. The examining agent concluded that there was no evidence of fraud with respect to the returns filed by E. J. Hubner reporting his share of the business income. [R. 49-51, 72-73] The appellant and E. J. Hubner had married on May 23, 1952, and filed a joint federal income tax return for the calendar year 1952. In this return was reported E. J. Hubner's distributive share of the partnership income for the fiscal year ended February 29, 1952. [R. 73]

Prior to the marriage, E. J. Hubner had transferred a ranch to the appellant to which the Government may look to satisfy its claim against the estate of E. J. Hubner for the delinquency in tax resulting from the operation of the partnership. However, this liability is of a civil nature. No criminal investigation of the corporation, the

partnership, the estate of E. J. Hubner, or the appellant is in progress or contemplated by the Internal Revenue Service. [R. 50, 74]

However, a criminal investigation of the tax liability of Clifford O. Boren and Delta M. Boren for the years 1950 and 1951 is being conducted and has not been completed based on a preliminary conclusion that an amount in excess of $40,000 has been omitted as income from the returns of these taxpayers. They have consented in writing to extend the statute of limitations with respect to their civil liability for the year 1950 through June 30, 1955. [R. 47-48, 74-75]

Summary of Argument.

A special agent of the Internal Revenue Service here seeks to aid his investigation of a taxpayer's liability by the examination of the records of a third party's transactions with the taxpayer. The custodian of the third party's records resists such an examination on the ground that those records have already been examined once by the Internal Revenue Service, and on the further ground that to produce the records would incriminate the custodian. The facts before the lower court show, first of all, that the revenue agents who examined the records of the Hubner Building Companies, both partnership and corporation, are not the same persons as the special agent-appellee investigating the criminal tax liability of the Borens. The production of the records and memoranda pertaining specifically to transactions between the Hubner

businesses and the Borens for the years 1950, 1951 and 1952 is not an oppressive request. Based on the conclusion drawn from the prior audit of the Hubner Companies, said records are clearly necessary to a proper determination of the Borens' tax liability.

The procedural requirements of Section 7605(b) relative to a second examination of a taxpayer's books are only applicable where the investigation being conducted is of the owner of the books. It is not pertinent where the books are those of a third party. The taxpayer referred to in Section 7605(b) is the one whose return is under investigation.

The summons issued by the appellee is sufficiently definite and narrow in scope as to be reasonably certain, and compliance therewith would not be oppressive so as to constitute an unreasonable search and seizure.

It is clear that the records and data sought to be examined relate only to those transactions between the Hubner Companies and the Borens for the years 1950, 1951 and 1952. Since the appellant was at no time interested either in the Hubner partnership or corporation as owner or employee, only her husband, who is now deceased, would have had standing to claim the privilege against self-incrimination. The mere fact that appellant executed a joint federal income tax return for the year 1952 in which was included her husband's income from the Hubner Building Company partnership, where the partnership was dissolved prior to the marriage, can in no way give her standing to claim the privilege. The records here sought are not the appellant's personal records; her possession of them is merely that of a custodian.

ARGUMENT.

I.

The Summons on Its Face Satisfies the Requirements of Sections 7602, 7603, and 7605 of the Internal Revenue Code of 1954.

Sections 7602-7605 of the Internal Revenue Code of 1954 are in large part embodiments of corresponding provisions of the 1939 Internal Revenue Code, so that the decisions interpreting the latter are here apposite.

Section 7602 provides that "For the purpose of ascertaining the correctness of any return" an agent is authorized "(1) To examine any books, papers, records, or other data which may be relevant * * * (2) To summon * * * any person having possession, custody, or care of books of account containing entries relating to the business of the person liable for tax * * * to produce such books, papers, records, or other data * * *." The uncontroverted facts disclose that the returns, the correctness of which is questioned, are those of Clifford O. Boren and Delta M. Boren and that the person having possession and custody of the books and papers to be examined is the appellant. The facts are clear both from the summons and affidavits filed with the lower court that the investigation is in no wise directed toward the appellant, the estate of E. J. Hubner, the Hubner Building Companies, or any concern connected with the appellant. The only returns which are questioned by the appellee are those of the Borens.

The previous examination of the books in the appellant's possession by other agents was conducted with a view toward determining the civil tax liability of the Hubner Companies and E. J. Hubner. That audit was

not at all directed toward the tax liability of the Borens or either of them. The true scope of the instant examination becomes material in view of the written consent executed by the Borens extending the statute of limitations for the assessment of any deficiency in tax for the year 1950 through June 30, 1955. [R. 44-45]

Furthermore, this fact serves to distinguish this case from cases where the Internal Revenue Service decides to re-investigate a case after the statute of limitations has expired, based on a subsequent determination of fraud. *In re Andrews' Tax Liability,* 18 Fed. Supp. 804 (D. C. Md. 1937). When the summons was here served, the statute of limitations had not expired for any of the years under investigation.

Question then arises as to whether Section 7605(b), which was embodied in the 1939 Internal Revenue Code as Section 3631, renders the summons invalid. "* * * the statute [forerunner of §3631] * * * forbids a further examination after one has been made unless the same is necessary, and 'necessary' in the context means reasonable; any right of privacy or to be let alone must yield to the reasonable exercise on the part of the Government of its power of investigation in aid of the collection of taxes." *Zimmerman v. Wilson,* 25 Fed. Supp. 75, 77, *Aff'd,* 105 F. 2d 583 (3rd Cir. 1939).

This Court, in *Martin v. Chandis Securities Co.,* 128 F. 2d 731 (9th Cir. 1942), interpreted Section 3631 as a limitation on the part of the Bureau of Internal Revenue,

in order to prevent unnecessary examinations or investigations. However,

> "the facts in this case show that the Hubner Companies had considerable dealings with the Borens, and that there is a possible additional tax liability of the Borens in excess of $40,000 for the years 1950-1951; that the previous examination of the Hubner books indicated that a full audit of them in connection with the Boren investigation would produce facts bearing upon the possible liability or nonliability of the Borens. The presently requested examination is thus 'necessary'." Memorandum of U. S. District Judge Hall [R. 67]. See *Falsone v. U. S.*, 205 F. 2d 734 (5th Cir. 1953), *Cert. denied,* 346 U. S. 864 (1953).

This concept of "necessary" is not indigenous to tax inquiries, but cuts across any governmental investigation in order to prevent invasion of our civil rights by way of fishing expeditions. Thus, this limitation of the statute is merely declaratory of existing law.

The requirement of Section 7605(b) that

> "a second or additional examination of a taxpayer's books can be made only at the taxpayer's request or on written notification of the Secretary, applies only to a second examination of the books of a taxpayer whose tax is in question. They do not apply to a case, such as here, where the books are those of a third person (Hubner) and not the books of the one whose tax is in question (the Borens) * * * the 'taxpayer' referred to in § 7605(b) is the one whose return is under investigation. It does not mean a third party who, as here, in the final analysis is merely a witness having in her possession evidence con-

> cerning the possible tax liability of some other person or persons." Memorandum of District Judge Hall. [R. 67]

It is inconceivable that an investigation of a taxpayer such as was made of the Hubner Companies would forever bar the Internal Revenue Service from thereafter examining the books and records of the Hubner Companies on matters pertaining to, and solely affecting, the tax liability of one of their customers. The fallacy is patent if one assumes, for example, that a large bank has been audited by the Internal Revenue Service for a certain taxable year, and after such an investigation arrives at a settlement of the tax liability for that particular year. Under the appellant's theory the Internal Revenue Service would thereafter be precluded from again examining the bank's books and records not only as they may pertain to the bank's liability, but also as they may pertain to the tax investigation and liability of all of the bank's depositors and customers. Such an interpretation would be very strained, and if carried to its illogical extreme, would effectively tie the hands of the Internal Revenue Service.

> "The ascertainment and enforcement of tax obligations is not a game in which a false move is to be penalized by a procedural bar of some kind. The only question is whether, under the circumstances, more than one examination is an unreasonable encroachment upon the right to be let alone which the constitution protects." *Zimmerman v. Wilson, supra,* 25 Fed. Supp. at 78.

II.

Compliance With the Summons Would Not Constitute an Unreasonable Search and Seizure.

The appellant contends that the summons contains "none of the reasonable specifications and designations required by the Fourth Amendment." (App. Br. 11.) Nowhere is it argued wherein the summons is deficient except insofar as Section 7605(b) is concerned. It is clear that the summons specifies with reasonable certainty and particularity what is called for within the meaning of Section 7603, in terms of certain records for certain periods.

The Supreme Court of the United States pointed out in *Brown v. U. S.*, 276 U. S. 134, 142 (1928):

> "In *Hale v. Henkel,* 201 U. S. 43, * * * this Court held that a subpoena *duces tecum* requiring a witness to produce all understandings, contracts and correspondence between a corporation named and six different companies, as well as all reports made and accounts rendered by them from the date of the organization of the corporation, and all letters received by the corporation since its organization from more than a dozen different companies, was too sweeping to be regarded as reasonable. The limitation in respect of time embraced the entire period of the corporation's existence and there was no specification in respect of subject matter; and this Court said that if the return had required the production of all the books, papers and documents found in the office of the corporation, it would scarcely be more universal in its operation, or more completely put a stop to the business of the company. The subpoena here under consideration is very different.

> It specifies a reasonable period of time and, with reasonable particularity, the subjects to which the documents called for relate. The question is ruled, not by *Hale v. Henkel,* but by *Consolidated Rendering Co. v. Vermont,* 207 U. S. 541, 553-554, and *Wheeler v. United States,* 226 U. S. 478, 482-483, 489."

Nor is the case at bar ruled by *Hale v. Henkel,* 201 U. S. 43 (1905).

The demands of the summons do not come near approximating what was requested in *First National Bank of Mobile v. U. S.,* 160 F. 2d 532 (5th Cir., 1947), where over six million entries covering five years would have been examined in order to comply with the summons. This the Court felt was unreasonable. Similarly, a request for entries covering 24 years in *Martin v. Chandis Securities Co., supra,* was considered onerous and unreasonable.

A "search is 'unreasonable' only because it is out of proportion to the end sought, as when the person served is required to fetch all his books at once to an exploratory investigation whose purposes and limits can be determined only as it proceeds. The investigation at bar was no such 'fishing excursion,' it was limited to transactions in the two companies, as to which the Commission already had some evidence of violation of the statute." *McMann v. Securities and Exchange Commission,* 87 F. 2d 377, 379 (2d Cir., 1937). To paraphrase Judge Learned Hand's opinion in this decision: There is no oppression, or evidence of any other motive than a lawful investigation. Unless this subpoena is valid, it is impossible to see how the internal revenue statutes can be enforced at all, or how any wrongdoer can be brought to book. *Ibid.*

III.

The Appellant Has No Standing to Claim the Privilege of Self-incrimination With Respect to the Books and Records Summoned.

The only connection the appellant has with the books and records which the appellee sought to examine, which could conceivably be the basis for criminal prosecution, is that the income from the Hubner Company partnership, of which her deceased husband was a partner, was included in the 1952 joint Federal income tax return which she executed. No portion of this income was community, as the partnership was dissolved prior to their marriage. She was at no time a stockholder, officer, director or employee of the Hubner Building Company corporation or a partner or employee of the Hubner Company partnership. On the state of the record presented by the appellant, she could not be the subject of a criminal prosecution. Only her husband would have had standing to claim the privilege.

The only thing that can be said for her present position is that the papers which the agent summoned could lay the foundation for a civil transferee assessment against her as a transferee for inadequate consideration of assets from an insolvent taxpayer, the estate of her husband.

The fact that her husband may have been guilty of tax evasion, insofar as the partnership income was concerned, would not render her also guilty. The joint and several liability of a joint return is a civil, and not a criminal, matter.

Conclusion.

The judgment and order of the District Court should be affirmed.

Respectfully submitted,

LAUGHLIN E. WATERS,
United States Attorney,

EDWARD R. MCHALE,
Assistant United States Attorney,
Chief, Tax Division,

ROBERT H. WYSHAK,
Assistant United States Attorney,
Attorneys for Appellee.

HARRY D. STEWARD,

HOWARD R. HARRIS,
Assistant United States Attorneys.
Of Counsel.

June, 1955.

APPENDIX.

Internal Revenue Code of 1954.

SECTION 7602

SEC. 7602. EXAMINATION OF BOOKS AND WITNESSES.

For the purpose of ascertaining the correctness of any return, making a return where none has been made, determining the liability of any person for any internal revenue tax or the liability at law or in equity of any transferee or fiduciary of any person in respect of any internal revenue tax, or collecting any such liability, the Secretary or his delegate is authorized—

(1) To examine any books, papers, records, or other data which may be relevant or material to such inquiry;

(2) To summon the person liable for tax or required to perform the act, or any officer or employee of such person, or any person having possession, custody or care of books of account containing entries relating to the business of the person liable for tax or required to perform the act, or any other person the Secretary or his delegate may deem proper, to appear before the Secretary or his delegate at a time and place named in the summons and to produce such books, papers, records, or other data, and to give such testimony, under oath, as may be relevant or material to such inquiry; and

(3) To take such testimony of the person concerned, under oath, as may be relevant or material to such inquiry.

(68A Stat. 901.)

SECTION 7603

SEC. 7603. SERVICE OF SUMMONS.

* * * When the summons requires the production of books, papers, records, or other data, it shall be sufficient if such books, papers, records, or other data are described with reasonable certainty.

(68A Stat. 902.)

SECTION 7604(a) and (b).

SEC. 7604. ENFORCEMENT OF SUMMONS.

(a) Jurisdiction of District Court.—If any person is summoned under the internal revenue laws to appear, to testify, or to produce books, papers, records, or other data, the United States district court for the district in which such person resides or is found shall have jurisdiction by appropriate process to compel such attendance, testimony, or production of books, papers, records, or other data.

(b) Enforcement.—Whenever any person summoned under section 7602 neglects or refuses to obey such summons, or to produce books, papers, records, or other data, or to give testimony, as required, the Secretary or his delegate may apply to the judge of the district court or to a United States commissioner for the district within which the person so summoned resides or is found for an attachment against him as for a contempt. It shall be the duty of the judge or commissioner to hear the application, and, if satisfactory proof is made, to issue an attachment, directed to some proper officer, for the arrest of such person, and upon his being brought before him to proceed to a hearing of the case; and upon such hearing the judge or the United States commissioner shall

have power to make such order as he shall deem proper, not inconsistent with the law for the punishment of contempts, to enforce obedience to the requirements of the summons and to punish such person for his default or disobedience.

(68A Stat. 902.)

SECTION 7605(b).

SEC. 7605. TIME AND PLACE OF EXAMINATION.

* * *

(b) Restrictions on Examination of Taxpayer.—No taxpayer shall be subjected to unnecessary examination or investigations, and only one inspection of a taxpayer's books of account shall be made for each taxable year unless the taxpayer requests otherwise or unless the Secretary or his delegate, after investigation, notifies the taxpayer in writing that an additional inspection is necessary.

(68A Stat. 902.)

Internal Revenue Code of 1939.

SECTION 3631.

SEC. 3631. RESTRICTIONS ON EXAMINATION OF TAXPAYERS.

No taxpayer shall be subjected to unnecessary examinations or investigations, and only one inspection of a taxpayer's books of account shall be made for each taxable year unless the taxpayer requests otherwise or unless the Commissioner, after investigation, notifies the taxpayer in writing that an additional inspection is necessary.

(26 U. S. C., 1940 Ed. §3631.)